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5 UNITED STATES BANKRUPTCY COURT
6 NORTHERN DISTRICT OF CALIFORNIA

7 In re

8 ALAN and JACQUELYN BUCHANAN,

No. 03-10187

9 Debtor(s).
10 _____/

11 CHARLES SIMS, Trustee,

12 Plaintiff(s),

13 v.

A.P. No. 03-1059

14 CALIFORNIA BANK & TRUST,

15 Defendant(s).
16 _____/

17 Memorandum re Attorneys' Fees
18 _____

19 Local Rule 54-5 of the United States District Court for the Northern District of California used to
20 provide that a motion for attorneys' fees had to be filed within 60 days of entry of judgment. The rule
21 was recently amended to change the time to 14 days. Relying on the older version of the rule, plaintiff
22 filed his motion for fees 38 days after entry of the judgment. He now seeks relief from the mistake.

23 This court does not promulgate separate local rules for all situations; Bankruptcy Local Rule
24 1001-2(a) incorporates by reference many of the local rules of the District Court, including Local Rule
25 54-5. Thus, the district court's amendment of its local rule resulted in a "secret" amendment to the
26 bankruptcy court's local rule.

While the court feels that counsel's mistake is entirely understandable and one the undersigned

1 would probably have made as well, it appears to be outside the court's discretion to excuse it. A
2 mistake as to the applicable time allowed by a local rule for filing an attorney's fee motion is not
3 excusable neglect, nor is lack of awareness of a change in a rule. *Kyle v. Campbell Soup Co.*, 28 F.3d
4 928, 930 (9th Cir. 1994).

5 If it is any consolation to plaintiff, the court does not agree that an award of attorneys' fees in this
6 case would be set off against the creditor's dividend as opposed to its claim. If an unsecured creditor
7 prevails against the estate in postpetition litigation over a prepetition contract, its fees are added to its
8 prepetition claim. *In re Abercrombie*, 139 F.3d 755, 757 (9th Cir. 1998). Therefore, fees allowed
9 against it should be set off against the claim. Plaintiff's argument regarding the creditor's secured status
10 is irrelevant since (if the court was correct in its judgment) the creditor was unsecured from the time it
11 waived its security and this adversary proceeding has always been between a trustee and an unsecured
12 creditor.

13 For the foregoing reasons, plaintiff's motion for attorneys' fees will be denied. Counsel for
14 defendant shall submit an appropriate form of order.

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17 Dated: September 6, 2003

Alan Jaroslovsky
U.S. Bankruptcy Judge